Zakaria Yatim J: The plaintiff, who was carrying on business under the name of Gopsan (India), filed a writ of summons in rem on 27 April 1988 against the owners of a vessel, Indera Pertama, for damages for breach of contract and for negligence. Gopsan (India) claimed to be the owner of 1332.71 cmb of Sabah round logs, 'the cargo', shipped on the Indera Pertama from Sandakan/Weston to Calcutta but the cargo did not arrive in Calcutta. On the day the writ was filed the vessel with the cargo on board was at Pasir Gudang port. On 26 May 1988 Gopsan (India) obtained an order of the court for the issue of a warrant to arrest the said vessel. The vessel was duly arrested by the sheriff on 27 May 1988. On 3 November 1988, on the application of the shipowners, I ordered, inter alia, that the writ of summons in this action be set aside; and the order given on 26 May 1988 for the arrest of the vessel be set aside. See my written judgment dated 30 December 1988 [see [1989] 3 MLJ 58].

After this order was made, the firm of solicitors, Messrs Anthony Fernandez & Partners, acting on behalf of Malayan Produce Merchants Sdn Bhd, the seller of the cargo in this case, lodged a caveat on 4 November 1988 against the release of the vessel. On 3 November 1988 the senior assistant registrar issued a notice to Messrs Anthony Fernandez and Partners to show cause why the caveat lodged by them should not be lifted in view of the order of the court setting aside the warrant of arrest in respect of the vessel. It was in pursuance of this notice to show cause that both the caveator and the shipowners appeared before me on 14 December 1988.

Mr Fernandez, counsel for the caveator submitted that the proper procedure to be adopted was for the owners of the vessel to make the application to have the caveat lifted. Mr Navaratnam, counsel for the owners of the vessel, agreed with Mr Fernandez's submission with regard to the procedure to be adopted. In any case, both counsels proceeded with their arguments as to whether the caveat should be lifted or not. Mr Fernandez argued that the setting aside of the warrant of arrest on 3 November 1988 did not ipso facto lead to the lifting of the caveat against the release of the vessel. In support of his argument he relied on a Singapore decision, *Hong Lee* v *Golden Dragon Shipping (Singapore) Private Ltd*,[1] where the Court of Appeal held that the caveat remained in force after the warrant of arrest had been set aside. He also said that formal notice should be given to him before an application is made to lift the caveat.

Mr Navaratnam submitted that when the caveat was lodged on 4 November 1988, the warrant of arrest had already been set aside. Indeed, Mr Fernandez conceded that the caveat was lodged one day after the warrant of arrest was set aside. Order 70 r 13(1) states as follows:

> A person who desires to prevent the release of any property under arrest in an action in rem and the payment out of Court of any money in Court representing the proceeds of sale of that property must file in the Registry a praecipe in Form 162, and the filing of praecipe a caveat against the issue of a release with respect to that property and the payment out of Court of that money shall be entered in the caveat book.

It is significant to note that under the above rule, a person may lodge a caveat if he 'desires to prevent the release of any property under arrest in an action in rem ...'. In other words he must lodge the caveat while the warrant of arrest was in force. In the instant case, since the warrant of arrest had been set aside on 3 March 1988, the vessel was no longer under arrest on 4 November and the question of preventing the release of the vessel on the date the caveat was lodged did not arise. Therefore the caveat lodged on 4 November 1988 is unenforceable and ineffective in law. From the wording of O 70 r 13(1) the caveat cannot apply retrospectively. In the *Hong Lee* case,[1] the caveat was lodged while the vessel, the 'Golden Elephant', was under arrest. That case therefore does not apply to the present case.

In the circumstances, since the caveat was filed wrongly, in that when the vessel was no longer under arrest, the caveat has no legal effect whatsoever and the court need not make any order to have the caveat lifted. Each party to bear his own costs.

Order accordingly.

Solicitors: *Anthony Fernandez & Partners*; *Shearn Delamore & Co.*

Reported by *Wong Kim Fatt*

Shanti Kant Jinghan v Owners or other persons interested in the vessel 'Indera Pertama' & Anor

HIGH COURT (KUALA LUMPUR) – ADMIRALTY IN REM NO D1-41-5-88
ZAKARIA YATIM J
30 DECEMBER 1988

Shipping – Admiralty in rem – Plaintiff claimed to be cargo owner – Action for breach of contract and negligence – Application to set aside writ and warrant of arrest of vessel – Whether plaintiff a consignee or endorsee or holder for value – Bill of lading – Endorsements in blank – Special endorsement – Property does not pass by mere endorsement – Bill of exchange lapse – Unpaid seller – Plaintiff had no title in cargo – No locus standi – Writ and warrant set aside

Sale of goods – Plaintiff claimed to be cargo owner – Whether plaintiff a consignee or endorsee or holder for value – Bill of lading – Made out to shipper's order – Sellers reserving right of disposal – Bill of lading not made out to plaintiff or to order – Shipper entitled to transfer bill of lading – Endorsements in blank – Special endorsement – Property does not pass by mere endorsement – Bill of exchange lapse – Unpaid seller – Plaintiff had no title in cargo – Sale of Goods (Malay States) Ordinance 1957

This is an application by the first defendant for, inter alia, an order that the writ of summons in this action be set aside;

and/or the order dated 16 May 1988 and the warrant of arrest issued in respect of the vessel 'Indera Pertama' be discharged. The plaintiff claims to be the owner of 1332.71 cmb of Sabah round logs ('the cargo') which were shipped on board the first defendant's vessel 'Indera Pertama' for carriage from Sandakan/Weston to Calcutta, and the holder and/or indorsee of four bills of lading whereunder the cargo was shipped. The plaintiff claims damages from the first defendant for breach of contract and/or breach of duty and/or negligence. On the application of the plaintiff, the vessel was duly arrested by the sheriff at Pasir Gudang. The first defendant is the owner of the vessel, while the second defendant is the supplier of the cargo and the charterer. The first defendant averred that the plaintiff was neither a consignee in respect of the bills of lading nor endorsee nor holder for value.

Held, allowing the application:

(1) It is clear that the four bills of lading contain indorsements on the reverse side. The law, however, states the property does not pass merely by endorsement of bills of lading.

(2) From the documentary evidence, it is clear that the plaintiff failed to pay for the goods mentioned in the four bills of lading according to the terms of the four bills of exchange. In view of the non-payment by the plaintiff, the four bills of exchange had lapsed and the plaintiff can no longer rely on the said bills. Since the plaintiff had failed to comply with the terms of the bills of exchange, the seller is deemed to be an unpaid seller, and since no payment was made the property in the goods does not pass to the plaintiff.

(3) Since the plaintiff had no title to the goods mentioned in the four bills of lading on the date the writ of summons was filed, ie 27 April 1988, he has, therefore, no locus standi to maintain the present action at the material time. His action clearly is an abuse of the process of the court. The writ should not have been issued against the first defendant because the plaintiff not only has no locus standi to maintain the action, but also has no cause of action at the material time. The writ was therefore set aside pursuant to O 12 r 7.

(4) With regard to the arrest of the vessel 'Indera Pertama', the warrant of arrest was issued on 26 May 1988. It is clear from O 70 r 4(1) of the Rules of the High Court 1980 that the warrant of arrest depends on the existence of a writ in rem. The right to arrest the res in an admiralty action in rem goes hand in hand with the right to proceed in rem. The setting aside of a writ removes the basis for the arrest. In the present case, since the writ in rem has been set aside, it follows that there is no legal basis for the warrant of arrest to remain in force. The court therefore set aside the warrant of arrest issued on 26 May 1988.

(4) The following orders were made: (i) that the writ of summons be set aside on the ground that the plaintiff has no cause of action; (ii) that the order given on 26 May 1988 for the arrest of the vessel 'Indera Pertama' be set aside; (iii) that a date be fixed by the senior assistant registrar for assessment of damages suffered by the first defendant as a result of the arrest and that the plaintiff do pay to the first defendant the damages so assessed; (iv) that the plaintiff do pay the costs of this application to the first defendant; (v) that the plaintiff do pay to the court sheriff any sums due and owing to the sheriff for the maintenance of the vessel from the date of arrest to the date of this order.

Cases referred to

1 *Mitsui & Co Ltd & Anor* v *Flota Mercante Grancolombiana SA* [1988] 1 WLR 1145 (refd)
2 *Leigh & Sillavan Ltd* v *Aliakmon Shipping Co Ltd ('The Aliakmon')* [1986] 2 All ER 145
3 *Sewell* v *James Burdick* [1884] 10 AC 74 (folld)

Legislation referred to

Rules of the High Court 1980 O 12 rr 7, (1), O 70 r 4 (1)
Sale of Goods (Malay States) Ordinance 1957 ss 25 (2), (3), 45 (1)(b)

P Valen for the plaintiff.
JA Yeoh for the first defendant.
Anthony Fernandez for the second defendant/intervener.
M Nagarajah for the caveator

Cur Adv Vult

Zakaria Yatim J: This is an application by the first defendant for an order that the writ of summons in this action be set aside; and/or the order dated 26 May 1988 and the warrant of arrest issued in respect of the vessel 'Indera Pertama' be discharged or set aside. The application also asks for an order that the plaintiff pay damages to the first defendant in respect of loss suffered by them as a result of the wrongful arrest. Finally the first defendant asks that the costs of this application be borne by the plaintiff.

On 3 November 1988, after hearing the submissions of counsel and after considering all the documentary exhibits, I made the following order:

(i) that the writ of summons be set aside on the ground that the plaintiff has no cause of action;
(ii) that the order given on 26 May 1988 for the arrest of the vessel 'Indera Pertama' be set aside;
(iii) that a date be fixed by the senior assistant registrar of the High Court for assessment of damages suffered by the first defendant as a result of the arrest and that the plaintiff do pay to the first defendant the damages so assessed;
(iv) that the plaintiff do pay the costs of this application to the first defendant;
(v) that the plaintiff do pay to the court sheriff any sums due and owing to the sheriff for the maintenance of the vessel from the date of arrest to the date of this order.

When I made the order, I stated that I would give my reasons later. I do so now.

The application is made under O 12 r 7(1) of the Rules of the High Court 1980. The first defendant filed its conditional appearance on 2 June 1988 and the present application on 6 June 1988. The plaintiff filed his writ of summons in action in rem on 27 April 1988. In the indorsement of the writ the plaintiff claims that he is the owner of 1332.71 cmb of Sabah round logs ('the cargo') which were shipped on board the first defendant's vessel 'Indera Pertama' for carriage from Sandakan/Weston to Calcutta and he is the holder and/or indorsee of bills of lading nos SN/C1-1, SN/C1-3, SSB/W/8 and SSB/W/6 whereunder the cargo was shipped. The plaintiff claims damages from the first defendant for breach of contract and/or breach of duty and/or negligence.

On 26 April 1988, the plaintiff filed an action in personam against the first defendant vide Admiralty in

Personam No D4-41-4-88. Both the plaintiff and the defendants agreed that documents filed in that action may be relied upon for the purpose of the present application. On 26 May 1988, on the application of the plaintiff, the senior assistant registrar issued a warrant for the arrest of the vessel 'Indera Pertama'. The vessel was duly arrested by the sheriff at Pasir Gudang. The first defendant is the owner of the vessel. The second defendant is the supplier of the cargo and the charterer. The plaintiff claims to be the owner of the cargo as holder and/or endorsee of the four bills of lading.

In their affidavit in support of the application to set aside the writ, the first defendant averred that the plaintiff was neither a consignee in respect of the bills of lading nos SN/C1-1, SN/C1-3, SSB/W/8 and SSB/W/6 nor endorsee nor holder for value. Mr Yeoh, counsel for the first defendant submitted that at all material times the bills of lading had not been endorsed and accordingly the plaintiff had no title to institute the present proceeding. According to him the plaintiff was not entitled to issue the warrant of arrest. Mr Yeoh also submitted that the bills of exchange accompanying the bills of lading had not been accepted by the plaintiff at the material time. At the end of Mr Yeoh's submission, Mr Valen, counsel for the plaintiff, informed the court that he wished to file a further affidavit to show the indorsements at the back of the bills of lading. Mr Yeoh objected to the plaintiff producing further evidence. After hearing the submission of Mr A Fernandez on behalf of Mr Valen and after hearing Mr Yeoh's submission, the court allowed the plaintiff to file a further affidavit. The affidavit affirmed by the plaintiff on 18 August 1988 was filed on the same day (hereinafter referred to as 'new affidavit').

The first question for the court to consider is whether the plaintiff is the holder or endorsee of the four bills of lading. In his affidavit affirmed on 26 May 1988 in support of his application for the arrest of the 'Indera Pertama' the plaintiff averred that he is the owner of the cargo on board the vessel or holder and/or endorsee of the four bills of lading. The four bills of lading were however not exhibited to the said affidavit. In another affidavit affirmed on the same date, the plaintiff referred to Kuala Lumpur High Court Admiralty Suit in Personam No D4-41-4-88 commenced by the plaintiff against the owner of the vessel and to the injunction granted ex parte against the owner of the vessel on 27 April 1988 in that suit. In his affidavit affirmed on 26 April 1988 in support of his ex parte application for injunction in the suit in personam the plaintiff exhibited the four bills of lading. On 22 June 1988, I set aside the injunction granted ex parte on the ground that the plaintiff had no cause of action as he was not a consignee or endorsee or holder for value of the four bills of lading.

I shall now return to the present action in rem. The first defendant, in its affidavit affirmed on 6 June 1988 in support of the present application, averred that the plaintiff was neither a consignee in respect of the four bills of lading nor an endorsee nor a holder for value. The plaintiff, in his affidavit affirmed on 15 June 1988, adopted his earlier affidavit affirmed on 26 April 1988 and filed in support of his ex parte application for injunction in admiralty action in personam. On the reverse of each of the four bills of lading exhibited to the affidavit is a complete blank. This, I presume, is an oversight on the part of the plaintiff. Each of the four bills of lading which were exhibited to the original affidavit filed in the action in personam, contained some form of indorsements on the reverse side. The same exhibits were also reproduced by the first defendants in their affidavit affirmed on 22 October 1988 in the present action in rem. In the new affidavit the plaintiff has exhibited a set of three documents in respect of each bill of lading. In that affidavit the plaintiff averred that for each bill of lading there were three originals and it was customary that only one of the three 'originals' was indorsed by the collecting bank.

It is now necessary to examine the four bills of lading. In the box marked 'shipper', the name of the second defendant, 'Malayan Produce Merchant Sdn Bhd', appears in all the four bills of lading. Below that, in the box marked 'consignee' in three of the bills of lading, namely SSB/W/8, SSB/W/6 and SN/C1-1, the words, 'To Order' were inserted. These three bills of lading are therefore order bills and made out to shipper's order. In respect of this type of bill, no person is on the face of the bill entitled to give orders and it is the shipper who is entitled to transfer the bill and to direct the carrier to deliver the goods to the transferee. (*Benjamin on Sale of Goods* (3rd Ed) p 893.) In *Mitsui & Co Ltd & Anor* v *Flota Mercante Grancolombiana SA*,[1] the bills of lading were quite similar to the bills of lading in the present case. In that case the goods were shipped by a company known as Vikingos, who obtained five bills of lading. In the box marked 'Shipper/Exporter' the name of Vikingos was inserted and in the box marked 'Consignee' the words 'to order'. The Court of Appeal held that since by the bills of lading the goods were deliverable to the order of the sellers there was a prima facie presumption that the sellers reserved the right of disposal and the property in the goods would not pass. Section 25(2) of the Sale of Goods (Malay States) Ordinance 1957 also states:

> Where goods are shipped and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is prima facie deemed to reserve the right of disposal.

I shall now turn to the fourth bill of lading, viz SN/C1-3. Curiously enough, unlike the three bills of lading, this bill of lading contains the words 'To Order of Gopsan (India)' in the box marked 'consignee'. The question that arises here is whether those words mean that the plaintiff is a true consignee. In my opinion, the said bill of lading, which is made out 'To Order of Gopsan (India),' is not a

straight consigned bill in that it does not make the goods deliverable specifically to 'Gopsan (India)' and it is without words importing transferability such as 'on order or assigns'. (See *Benjamin on Sale of Goods* (3rd Ed) p 895.) The said bill of lading is not made out to 'Gopsan (India) or to order'. If that is the case, Gopsan (India) would be a named consignee and entitled to direct the goods to be delivered to someone other than himself. In the absence of a 'named consignee or to his order' in the box marked 'consignee', the bill of lading cannot be said to be made out to the order of the consignee: *Benjamin on Sale of Goods* (3rd Ed) p 893. On the face of the bill, Gopsan (India) cannot therefore claim that the goods are consigned to him specifically and no one else; and neither can he claim to be entitled as a named consignee to order the goods to be delivered to someone other than himself. Therefore, since no person is on the face of the bill entitled to direct the carrier to deliver the goods, the shipper must remain entitled to transfer the bill of lading. (*Benjamin on Sale of Goods* (3rd Ed) p 893.) The name, 'Gopsan (India)' appearing in the box marked 'notify address' does not confer any special status on the party named therein. There is no presumption in law that 'notify party' is the consignee to whom the goods are to be delivered. See *Marine Cargo Claims* (3rd Ed) p 199.

The next point to consider is whether the plaintiff is the holder and/or endorsee of the four bills of lading. In his affidavit affirmed on 26 May 1988, the plaintiff averred that he is the owner of the cargo on board the 'Indera Pertama' being the holder and/or endorse of the four bills of lading. The first defendant in its affidavit affirmed on 31 May 1988 averred that the plaintiff was neither endorsee nor a holder for value in respect of the four bills of lading. In order to ascertain this point it is necessary to examine the indorsements on the four bills of lading. On the reverse of each bill of lading, there is only the signature of the shipper, Malayan Produce Merchants Sdn Bhd. There are no instructions and the indorsement is not made in favour of the plaintiff. This is clearly an endorsement in blank. Another endorsement made on the reverse of each bill is by Bank Bumiputra Malaysia Berhad, Kuala Lumpur. The indorsement states 'Pay/deliver to the order of Vijaya Bank, Calcutta'. The endorsement was signed by Bank Bumiputra, and this is a special endorsement. From the evidence, the bills of lading were sent direct to Vijaya Bank ('the collecting bank') by Bank Bumiputra, which is the negotiating bank. It is clear from the new affidavit that the bills of lading together with the bills of exchange were sent to Vijaya Bank, Calcutta, in order to obtain the plaintiff's acceptance of the bills of exchange. The bills of lading were specially endorsed by Vijaya Bank and handed over to the plaintiff. This is stated at the back of the bills of lading by special endorsement in the following words: 'Deliver to the order of Gopsan (India)' and signed by Vijaya Bank. Apart from the endorsements stated above, there are two other signatures appearing at the back of the bills of lading. They are the signatures of 'Gopsan (India)' and 'Eastern Shipping Agency,' Calcutta. Both are endorsements in blank. It would appear from these two endorsements in blank, that the plaintiff upon receipt of the bills of lading had transferred the bills to Eastern Shipping Agency.

It is clear that the four bills of lading contain indorsements on the reverse side. The law, however, states that property does not pass merely by endorsement of the bill of lading. (*Benjamin on Sale of Goods* (3rd Ed) p 942.) The seller, through the negotiating bank, sent four bills of exchange together with the four bills of lading and four letters of instructions dated 29 February 1988 to the collecting bank. The first letter of instructions states the bill of exchange no MPM/O11 dated 29 February 1988 and the name of the drawee, Gopsan (India). The letter states the tenor of the bill of exchange, that is 45 days from the date of the bill of lading. The amount stated in the letter is US$13,956.60. The particulars stated in the letter of instructions are found in the said bill of exchange. The bill of exchange also states '66.46 cbm Sabah round logs shipped per Indera Pertama'. This bill of exchange refers to bill of lading no SN/C1-1. The second letter of instructions refers to a bill of exchange no MPM/O12 dated 29 February 1988 and the amount is US$133,589.67. All the other particulars are the same. The tenor of the bill of exchange was for 45 days from the date of the bill of lading, that is 13 February 1988. The bill of exchange is in respect of 881.78 cbm of Sabah round logs shipped in the same vessel. This amount of cargo corresponds with the bill of lading no SN/C1-3. The third letter of instructions mentions a bill of exchange number MPM/013 dated 29 February 1988 and the amount is US$33,243.75. The tenor of the bill of exchange is 45 days from the date of the bill of lading, that is 16 February 1988. The said bill of exchange states that the amount of cargo is 265.95 cbm Sabah round logs shipped in the same vessel. All the other particulars are the same. The amount of cargo and the date of the bill of lading show that the bill of exchange is in respect of bill of lading no SSB/W/8. The fourth letter of instructions refers to bill of exchange no MPM/014 dated 29 February 1988 and the amount is US$22,190.40. The tenor of the bill of exchange is 45 days from the date of the bill of lading, that is 16 February 1988. The bill of exchange referred to in the fourth letter is in respect of a total of 118.52 cbm of Sabah round logs shipped in the same vessel. This bill of exchange is in respect of bill of lading no SSB/W/6.

The bill of exchange no MPM/011 for the sum of US$13,956.60 was accepted by the plaintiff on 16 March 1988 for payment on 28 March 1988. See letter from Vijaya Bank to Bank Bumiputra dated 12 August 1988 which is exhibited to the new affidavit as exh SKJ-30

(hereinafter referred to as 'SKJ30'). On the reverse side of the said bill of exchange is written 'Accepted for payment on 28 March 1988' and signed by the plaintiff. It is significant to note that 28 March 1988 is 45 days from the date of the bill of lading, that is 13 February 1988. The bill of exchange no MPM/012 for the sum of US$133,589.67 was accepted by the plaintiff on 22 March 1988 for payment on 29 March 1988 (SKJ30). On the reverse side of this bill of exchange is written, 'Accepted for payment on 29 March 1988' and signed by the plaintiff. The 45 days from the date of the bill of lading expired after 29 March. The third bill of exchange no MPM/013 for the sum of of US$33,243.75 was accepted by the plaintiff on 16 March 1988 for payment on 31 March 1988 (see SKJ30). On the back of this bill of exchange is written 'Accepted for payment – 31 March 1988' and signed by the plaintiff. 31 March is 45 days from the date of bill of lading. The fourth bill of exchange no MPM/014 for the sum of US$22,190.40 was accepted by the plaintiff on 16 March 1988 for payment on 31 March 1988 (see SKJ30). On the back of this bill of exchange is written, 'Accepted for payment ... 31 March 1988' and signed by the plaintiff. 31 March is 45 days from the date of the bill of lading, that is 16 February 1988.

Before the expiry of the 45 days from the dates of the bills of lading, the seller wrote a letter to Bank Bumiputra on 12 March 1988 requesting the bank to inform the collecting bank that the terms of payment in respect of three bills of exchange be extended to 60 days from the dates of the bill of lading. The text of the letter is reproduced below:

> The Manager
> Export Bills Department
> Bank Bumiputra Malaysia Berhad
> 5th Floor, Wisma TAS
> Jalan Melaka
> Kuala Lumpur
>
> Dear Sir
>
> Re: Our Collection Bill Draft Nos
> MPM/011 FOR USD13,956.60
> MPM/013 FOR USD33,243.75
> MPM/014 FOR USD22,190.40
> Drawn On Gopsan (India), Through Vijaya Bank
> Brabourne Road Branch, Calcutta
>
> We refer to the above collection bills, we shall be pleased if you will kindly telex your correspondents in Calcutta to extend payment terms to read 60 days from B/L dates instead of 45 days. Please debit your telex charges to our account no 001-25055-79.
>
> Thanking you.
>
> Yours faithfully,
>
> Sgd
> Malayan Produce Merchants Sdn Bhd

It appears from the documentary exhibits, the seller had drawn a new set of three bills of exchange. The three new bills of exchange are also dated 29 February 1988. All the other particulars are the same as in the first set of bills of exchange except that in the new set the words '60 days' have replaced the words '45 days'. The new bill of exchange no MPM/011 was accepted by the plaintiff on 21 March 1988 for payment on 12 April 1988 (SKJ30). On the reverse side of the bill there is only one indorsement by the plaintiff and it is as follows: 'Accepted for payment on 12 April 1988' and signed by the plaintiff. Another new bill of exchange no MPM/013 was accepted by the plaintiff on 21 March 1988 for payment on 15 April 1988 (see SKJ 30). On the reverse side of this bill the words written are 'Accepted for payment on 15 April 1988' and signed by the plaintiff. The third new bill of exchange, bill no MPM/014, was accepted on 21 March 1988 for payment on 15 April 1988 (see SKJ30). On the reverse side of this bill is written, 'Accepted for payment on 15 April 1988' and signed by the plaintiff. The bill no MPM/011 was not extended to 60 days for payment. The date of expiry of the 60-day period from the dates of bills of lading in respect of bill no MPM/011 is 12 April 1988 and in respect of bill no MPM/013 and in respect of bill no MPM/014 the date of expiry is 15 April 1988.

The plaintiff, as drawee of the four bills of exchange, did not make any payment in respect of the sums stated in the bills on the dates payments were due on the expiry of the 60 days. On 21 May 1988, Vijaya Bank wrote the following letter, by registered post, to the plaintiff with a carbon copy to Bank Bumiputra.

> Gopsan (India)
> 18 Kalikrishna Tagore Street,
> Calcutta 7
>
> Dear Sirs
>
> Our FIDBC/BPC/45/88 for US$1395.60
> 46/88 for US$33243.75,
> 47/88 for US$22190.40 &
> 48/88 for US$133598.67.
>
> The captioned bills were due for payment on 12 April 1988, 15 April 1988, 15 April 1988 and 29 March 1988 respectively. But as of date we have neither received your bill of entry nor the payment. The overseas bank has been repeatedly reminding us, the last reminder being of 9 May 1988. Please let us have your immediate instructions. In the meantime, please send us the bills of entries.
>
> Yours faithfully,
>
> Sgd
> Branch Manager
> as ps
>
> cc:
>
> Bank Bumiputra Malaysia Berhad, Jalan Melaka,
> 50913 Kuala Lumpur, Malaysia.

On 27 May 1988, the seller, who drew the four bills of exchange wrote to Bank Bumiputra to inform the bank in Calcutta to extend the terms of payment to 150 days from the date of acceptance. The letter reads:

The Manager
Export Bills Department
Bank Bumiputra Malaysia Berhad
5th Floor, Wisma TAS
Jalan Melaka
Kuala Lumpur

Dear Sir

Re: Our Collection Bills Drawn On Gopsan (India) through Vijaya Bank, Calcutta.

With reference to the above, we shall be thankful if you will kindly telex your correspondents in Calcutta to extend the payment terms to read as follows:

a Draft no MPM/011 for US$13,956.60 – 150 days from B/L date instead of 60 days;
b Draft no MPM/012 for US$133,589.67 – 150 days from B/L date instead of 45 days;
c Draft no MPM/013 for US$33,243.75 – 150 days D/A from B/L date instead of 60 days;
d Draft no MPM/014 for US$22,190.40 – 150 days D/A from B/L date instead of 60 days

Please debit your telèx charges to our account no 001-25055-79.

Thanking you.

Yours faithfully,
Malayan Produce Merchants Sdn Bhd

Sgd
Madhavan Sukumaran
(Director).

In a subsequent letter to Bank Bumiputra dated 12 July 1988, the seller enclosed four new bills of exchange to allow payment to be made 150 days from the date of acceptance. The letter states:

The Manager
Export Bills Department
Bank Bumiputra Malaysia Berhad
5th Floor, Wisma TAS
Jalan Melaka
Kuala Lumpur

Attention: Puan Jamalia

Dear Sirs

Re: Our Collection Bills Drawn On Gopsan (India)
Through Vijaya Bank, Calcutta:
MPM/11 – FBCKL – 0038830046 for USD 13,956.60
MPM/12 – FBCKL – 0018216039 for USD 133.589.67
MPM/13 – FBCKL – 2818623345 for USD 23,243.75
MPM/14 – FBCKL – 8018230048 for USD 22,190.49

Further to our letter dated 27 May 1988, as requested by drawee, we have decided to extend the payment terms to 150 days from the date of acceptance by drawee, instead of B/L date.

In this connection, enclosed please find the amended drafts for your onward transmission.

Thanking you.

Yours faithfully,
Malayan Produce Merchants Sdn Bhd

Sgd
Madhavan Sukumaran
(Director).

Following the seller's instructions, Bank Bumiputra sent the new bills of exchange to Vijaya Bank together with letters of instructions dated 13 July 1988. All the four bills of exchange are dated 29 February 1988. The terms of payment stated in the four bills are 150 days from the dates of the bills of lading and not from the dates of acceptance. The bill of exchange no MPM/011 was accepted on 14 June 1988 for payment on 11 July 1988. The indorsement on the back confirms 'accepted for payment on 11 July 1988', and signed by the plaintiff. The second bill of exchange no MPM/012 was accepted on 14 June 1988 for payment on 11 July 1988. On the reverse side is written 'Accepted for payment on 11 July 1988', and signed by the plaintiff. The third bill of exchange no MPM/013 was accepted on 14 June 1988 for payment on 14 July 1988. On the reverse side is written 'Accepted for payment on 14 July 1988' and signed by the plaintiff. The fourth bill of exchange no MPM/014 was accepted on 14 June 1988 for payment on 14 July 1988. On the reverse side of the bill is written 'Accepted for payment on 14 July 1988' and signed by the plaintiff.

It is clear, from the documentary evidence, that the plaintiff failed to pay for the goods mentioned in the four bills of lading according to the terms of the four bills of exchange. As already noted, payment, in respect of three bills of exchange, was to be made 60 days from the dates of the bills of lading. The three bills of exchange, (MPM/011, MPM/013 and MPM/014) were due for payment on 12 April 1988, 15 April 1988 and 15 April 1988 respectively. The fourth bill of exchange, which was to be paid 45 days from the date of the bill of lading was due for payment on 29 March 1988. The letter from Vijaya Bank to the plaintiff which is reproduced above confirms that no payment was made. Indeed it is clear from the said letter that no payment was made up to the date of the letter, that is 21 May 1988. The replacement bills of exchange were only accepted by the plaintiff on 14 June 1988. In view of the non-payment by the plaintiff, the four bills of exchange had lapsed and the plaintiff can no longer rely on the said bills. Since the plaintiff had failed to comply with the terms of the bills of exchange, the seller is deemed to be an unpaid seller. (Sale of Goods (Malay States) Ordinance 1957, s 45 (1)(b))

On 27 April 1988, when the plaintiff filed the present action in rem, the plaintiff had not paid for the cargo mentioned in the four bills of lading. The first defendant in their affidavit affirmed on 22 October 1988 stated that at all material times the bills of exchange accompanying the respective bills of lading had in fact lapsed and that the replacement bills of exchange with extended maturity dates had not been accepted. The first defendant contended that the legal ownership or possessionary title to the cargo as per the bills of lading could not therefore have passed to the plaintiff. In my opinion, since no payment was made the property in the goods does not pass to the plaintiff. In *The Aliakmon*,[2] Lord Brandon of

Oakbrook in his speech at p 148 said, 'The property in the goods... does not pass until the buyer takes up and pays for the shipping documents'. In *Mitsui & Co Ltd & Anor* v *Flota Mercante Grancolombiana,*[1] Staughton LJ said at p 1153:

> It seems to me that in the ordinary way a seller will not wish to part with the property in his goods if they are shipped overseas until he has been paid in full.

In that case, the goods had been sold to the second plaintiffs fob with 80% of the contract price paid before shipment by means of a letter of credit. The Court of Appeal held that since there was no evidence that the remaining 20% of the price of the goods was paid, property in the goods had not passed from the sellers.

Section 25(3) of the Sale of Goods (Malay States) Ordinance 1957 states:

> Where the seller of goods draws on the buyer for the price and transmits the bill of exchange and bill of lading to the buyer together, to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him.

Section 25(3) is in pari materia with s 19(3) of the United Kingdom Sale of Goods Act 1979. *Benjamin on Sale of Goods* refers to s 19(3) at pp 944 and 945 and expresses the view on the section in the following words:

> ... the seller may send to the buyer a bill of exchange together with the bill of lading, and possibly other shipping documents, in order to obtain the buyer's acceptance of the bill of exchange. In such a case the buyer is under a contractual obligation to accept the bill of exchange... If the buyer refuses to accept a bill of exchange sent to him in these circumstances the property in the goods does not pass to him; and he is not entitled to retain or deal with the bill of lading... A bill of exchange may be dishonoured in two ways, by non-acceptance and by non-payment...

I respectfully adopt the view expressed in the passage quoted above for the purpose of construing s 25(3) of the Sale of Goods (Malay States) Ordinance 1957.

The first defendant, in its affidavit affirmed on 22 October 1988, averred that 'at all material times no value or consideration had in fact been given for the purported transfer of the respective bills of lading'. In my view, since no payment had been made in the present case there is, therefore, no consideration for the transfer of the goods to the plaintiff. Without consideration, the plaintiff does not have title in the property of the goods. The Earl of Selbourn LC, in his speech in *Sewell* v *James Burdick,*[3] at p 80 said, 'The finding must be reasonably understood; it cannot... mean that the property will be transferred when there is no consideration.' An indorsement of a bill of lading does not pass property or title to the indorsee where there is no consideration for the indorsement. See *Scrutton on Charterparties and Bills of Lading* (9th Ed) p 199. *Benjamin on Sale of Goods* also states:

> Consideration for the transfer of a bill of lading: The transfer of a bill of lading does not pass property or title... unless value is given for the transfer... Thus it has been held that the indorsement of a bill of lading to an agent solely with a view to enabling him to collect or store the goods did not pass any property to the agent. One reason for this result was that the agent had not given any consideration for the transfer...

Since the plaintiff had no title to the goods mentioned in the four bills of lading on the date the writ of summons was filed, that is 27 April 1988, he has, therefore, no locus standi to maintain the present action at the material time. His action clearly is an abuse of the process of the court. The writ should not have been issued against the first defendant because the plaintiff not only has no locus standi to maintain the action but also has no cause of action at the material time. I therefore set aside the writ pursuant to O 12 r 7.

I now turn to the arrest of the vessel 'Indera Pertama'. The warrant of arrest was issued on 26 May 1988. Order 70 r 4(1) of the Rules of the High Court 1980 states that 'after a writ has been issued in an action in rem a warrant... for the arrest of the property against which the action is brought may... be issued at the instance of the plaintiff...'. It is clear from this order that the warrant of arrest depends on the existence of a writ in rem. The right to arrest the res in an admiralty action in rem goes hand in hand with the right to proceed in rem. See N Meesan, *The Practice and Procedure of the Admiralty Court* (1986) p 15. The setting aside of a writ removes the basis for the arrest. See DC Jackson, *Enforcement of Maritime Claims* (1985) p 168. In the present case, since the writ in rem has been set aside, it follows that there is no legal basis for the warrant of arrest to remain in force. I therefore set aside the warrant of arrest issued on 26 May 1988. The rest of the order I made on 3 November 1988 is self-explanatory and consequential in nature.

Order accordingly.

Solicitors: *Tunku Zuhri, Manan & Abdullah*; *Shearn Delamore & Co*; *Anthony Fernandez & Partners*; *Shook Lin & Bok.*

Reported by *Wong Kim Fatt*